

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j)  
of the Communications Act  
Competitive Bidding

PP Docket No. 93-253

REPLY COMMENTS  
OF PMN, INC.

M. John Bowen, Jr.  
John W. Hunter

MCNAIR & SANFORD, P.A.  
1155 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 659-3900

Attorneys for PMN, Inc.

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## **SUMMARY**

PMN, Inc. ("PMN") continues to assert that an expansive definition of rural telephone companies is justified by the record in this proceeding. Specifically, PMN suggests that the Commission adopt its Class B company definition, as found in Section 32.11 of the Commission's Rules, to qualify as a designated entity. PMN favors a definition of small business as one with less than \$75 million in annual gross revenues in order to qualify as a designated entity. Small businesses and businesses owned by minorities and women should have a qualifying presence in the market to be served. Similarly, consortia of such designated entities should have at least one qualifying member with a presence in the market to be served. All consortia should be comprised of over 50% of designated entities in order to qualify for preferential treatment.

The Commission's proposal to set aside broadband PCS Blocks C and D for designated entities is supported by the record and justified as being consistent with the purposes of the Budget Act. Although it did not initially oppose combinatorial bidding for broadband PCS, PMN now believes that substantial arguments have been set forth in the Comments to justify its prohibition for both MTAs and BTAs. PMN also supports adoption of a limitation on the number of licenses that a single entity can hold.

Finally, PMN continues to advocate the elimination of the cellular attribution rule for designated entities, particularly rural telephone companies, as it would adversely affect their eligibility to provide PCS. PMN also recommends that the Commission specifically not count limited partnership interests in any cellular attribution.

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REPLY COMMENTS  
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PMN, Inc. hereby submits its reply comments to the comments filed in response to the Notice of Proposed Rule Making in the captioned proceeding, FCC 93-455, released October 12, 1993, 58 Fed. Reg. 53489 ("Notice"). In its Comments, PMN, Inc. ("PMN") advocated that designated entities be afforded certain opportunities to participate in competitive bidding for specific services and that equitable treatment be afforded to all such entities, assuming they are of similar economic viability. One designated entity category is the rural telephone company. PMN urged the Commission to adopt a definition that focuses on the overall size of the telephone company rather than on a particular area that it serves. PMN advocated that incentives and frequency block set-asides for Personal Communications Service ("PCS") available to designated entities should extend to consortia only if eligible entities have over 50% ownership interest and at least one of the eligible entities has a qualifying presence in the area for which the license is being sought by auction. PMN argued that, if combinatorial bidding is permitted, the Commission should first determine the groupings that will be combined. Finally, PMN expressed specific

concern over the attribution rule applicable to cellular entities for PCS eligibility and urged its elimination as it applies to designated entities.

Based on the comments submitted in this proceeding, PMN continues to advocate the positions set forth in its Comments, with certain modifications. PMN now opposes all combinatorial bidding. In addition, PMN advocates that small businesses and businesses owned by minorities and women as well as consortia of such entities, have a qualifying presence in the market for which they receive special measures. PMN also supports adoption of a limitation on the number of licenses that a single entity can hold. With regard to the cellular attribution rule for broadband PCS, PMN urges the Commission to exclude limited partnership interests in cellular entities from that rule.

I. A rural telephone company should be defined as a Class B company to qualify as a designated entity.

A substantial number of parties took exception to the Commission's proposed definition of a rural telephone company as serving an area of 2,500 population or less. Most parties urged that either the population figure be increased or modified, or that different criteria be used.<sup>1</sup> Not surprisingly, some larger entities advocated a test that

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<sup>1</sup>Comments of American Personal Communications at 7, CFW Communications Company, et al. at 1, Chickasaw Telephone Company at 3-4, Dial Page, Inc. at 5, GTE at 13, GVNW Inc. at 5, Iowa Network Services, Inc. at 11-15, McCaw Cellular Communications, Inc. at 19-21, MEBTEL, Inc. at 2-3, Minnesota Equal Access Network Services, Inc. at 2, National Rural Telecom Association at 6, National Telephone Cooperative Association at 3-8, OPASTCO at 4, PMN, Inc. at 7-8, Rochester Telephone Corporation at 15, Rocky Mountain Telecommunications Association, et al. at 19, Rural Cellular Association at 12-14, Rural Cellular Corporation at 2, Rural Telephone Company at 1, Small Telephone Companies of Louisiana at 11-13, Telephone Association of Michigan

focuses on a particular area served. This would allow any telephone company, regardless of overall size, to qualify as a rural telephone company if it provides service in even one geographically small area. Such a result would not be consistent with the Congressional purpose of Section 309(j) of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") to assure that designated entities are afforded the opportunity to participate in the service for which spectrum is being auctioned. Imputing designated entity status as a rural telephone company to the largest local exchange carriers in the country simply because they serve one area of 2,500 or less does not comport with the statutory objective.

A number of other parties advocated either increasing the 2,500 population figure set forth by the Commission or adopting a different test that would presumably limit the overall size of the telephone company. A commonly advocated test would classify a telephone company as rural if it:

- a) provides local exchange service to a local exchange study area that does not include either:
  - 1) any incorporated place of 10,000 or more; or
  - 2) any territory, incorporated or unincorporated, included in an urbanized area;
- OR
- b) provides telephone exchange service by wire to less than 10,000 access lines.<sup>2</sup>

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at 3, 6-7, Telephone Electronics Corporation at 9-13, Telocator at 10-11, United State Telephone Association at 3, U.S. Intelco Networks, Inc. at 14-15, and Western Wireless, Inc. at 1.

<sup>2</sup>Comments of OPASTCO at 5-6.

Variations of this test were to increase the permissible number of access lines served to 20,000,<sup>3</sup> 25,000,<sup>4</sup> 50,000,<sup>5</sup> or 150,000.<sup>6</sup> Other proposed tests focused directly on the overall size of the telephone company. PMN's proposal was to use the total revenues of the company and define as rural telephone companies those companies with less than \$100,000,000 annual gross revenue, which are defined as Class B companies in Section 32.11 of the Rules.

The Commission should adopt criteria for rural telephone companies that unmistakably foster the Congressional objective of providing the opportunity for rural telephone companies to participate in the provision of spectrum-based services. This requires that the overall size of the entity be the predominate basis for eligibility as a designated entity. This dictates that a simple, straightforward and reasonable test should be adopted.<sup>7</sup> PMN's proposed test based on gross revenues meets that requirement and should be adopted as the test for rural telephone company status as a designated entity.

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<sup>3</sup>Comments of Rocky Mountain Telecommunications Association, et al. at 19, and Western Wireless at 1.

<sup>4</sup>Comments of Rochester Telephone Corporation at 15.

<sup>5</sup>Comments of CFW Communications Company, et al. at 1. GNVW Inc. at 5, MEBTEL, Inc. at 2-3, Minnesota Equal Access Network Services, Inc. at 2, Rural Cellular Association at 12-14, Rural Cellular Corporation at 2, Small Telephone Companies of Louisiana at 11-13, Telephone Electronics Corporation at 13-15, and U.S. Intelco Networks, Inc. at 14-15.

<sup>6</sup>Comments of American Personal Communications at 7, Dial Page, Inc. at 5, and McCaw Cellular Communications at 19-21.

<sup>7</sup> McCaw called for "clear and precise definitions for designated entities." Comments at 19.

**II. Definitions and treatment of other designated entities must be consistent with the Congressional purposes of the Budget Act.**

A number of parties' comments addressed the proposed rules that govern the participation of other designated entities, i.e., small businesses and businesses owned by minorities and women, in the provision of spectrum-based services. The stated basis for adopting special measures for designated entities is to promote economic opportunity and competition, to avoid excessive concentration of licenses, and to disseminate licenses among a wide variety of applicants.<sup>8</sup> In its Comments, PMN advocated that equitable treatment be afforded to all designated entities, including rural telephone companies, assuming they are all of similar economic viability.<sup>9</sup>

Upon reviewing the comments, PMN is concerned that definitions of designated entities and criteria for participation become neither so restrictive that they apply only to a few entities nor so broad that classification as a designated entity becomes meaningless. The purposes of the Budget Act must be kept foremost in mind in adopting these rules.

With regard to small businesses and businesses owned by women and minorities, PMN advocates that the specific entity must have a qualifying presence in the market to be served. A number of parties advocated such a position in their Comments.<sup>10</sup> In the case of broadband PCS, this means in the particular BTA. A qualifying individual would be required to have his or her principal residence in the market to be served. A business

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<sup>8</sup>Sections 309(j)(3) and (4) of the Budget Act.

<sup>9</sup>Comments of PMN at 5.

<sup>10</sup>Comments of Alliance of Rural Area Telephone and Cellular Service Providers at 3-4, CFW Communications Company, et al. at 2, Liberty Cellular, Inc. at 4-5, MEBTEL, Inc. at 4, and System Engineering, Inc. at 1.



would be required to have an operating presence in the market to be served. Yet, despite these requirements, the possibility remains that designated entities could become so pervasive that they use their status to amass frequency allocations on a nationwide basis. Such a result would be contrary to the Congressional mandate of promoting competition and avoiding excessive concentration of licenses. The Commission should consider imposing a limitation on the number of licenses that one entity could hold for PCS.<sup>11</sup> Specifically, PMN advocates that a single entity be permitted to acquire no more than 30% of the licenses issued nationally in any given frequency block. For example, a single licensee could hold only 147 Block C licenses or 15 Block A licenses. There is ample precedent for such a measure.<sup>12</sup>

Additional consideration must be given to the qualifying definition of small business. Several parties recommended that the small business definition be altered from the \$6.0 million average net income qualifications or the telecommunications industry standard alternative of 1,500 employees.<sup>13</sup> For example, Tri-State Radio Company argues that a \$50.0 million net worth limit, an average annual operating cash flow for the two preceding years of \$5.0 million and a 200 employee limit be adopted.<sup>14</sup> Tri-State cites the capital

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<sup>11</sup>Other parties offered limitations on the number of licenses permitted. See Comments of Cellular Service, Inc. at 12.

<sup>12</sup>See Section 73.3555 of the Commission's Rules.

<sup>13</sup>Comments of CFW Communications Company, et al. at 2, and Independent Cellular Network, Inc. at 4.

<sup>14</sup>Comments of Tri-State Radio Company at 5-10.

intensive nature of the telecommunications industry and the high cost of new systems.<sup>15</sup> Alternatively, Suite 12 Group advocates that a single test of \$75 million or less in annual sales be adopted.<sup>16</sup> This position is justified on the basis that the 1,500 employee test is so high that it is meaningless and the net worth test is too low for the capital-intensive telecommunications industry.<sup>17</sup>

A number of compelling reasons have been advanced for adopting a higher threshold to qualify as a small business. PMN believes that a business with less than \$75 million in gross revenues should be classified as a small business and urges adoption of that standard. Such a test would be simple to determine and easily verifiable. It would also be consistent with the purposes of the Budget Act.

**III. Consortia should be allowed, but designated entities should hold over 50% ownership interest in order to qualify for preferential treatment.**

A substantial number of parties supported the concept of allowing consortia of designated entities to be eligible for preferential treatment.<sup>18</sup> The point of controversy

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<sup>15</sup> Id.

<sup>16</sup> Comments of Suite 12 Group at 9-11.

<sup>17</sup> Id.

<sup>18</sup>Comments of Alliance for Fairness and Viable Opportunity at 11, Alliance of Rural Area Telephone and Cellular Service Providers at 3, Chickasaw Telephone Company at 6-7, Corporate Technology Partners at 7, Mercury Communications, L.C. at 1, Richard S. Myers at 6-7, National Association of Black Owned Broadcasters, Inc. at 5-7, National Association of Minority Telecommunications Executives and Companies at 19, Pacific Bell and Nevada Bell at 21, Rocky Mountain Telecommunications Association, et al. at 21, Small Business PCS Association at 6, Telephone Association of Michigan at 7-8, U.S. Intelco Networks, Inc.

centered around the permissible degree of involvement by outside entities. Positions ranged from requiring only one designated entity in a consortium to requiring all members of a consortium to qualify individually as designated entities. Between those two extremes were positions advocating that designated entities control the consortium and that designated entities own over 50% of the consortium.

Justification for allowing some degree of non-designated entity participation in consortia centered around the belief that larger companies could provide financial support and telecommunications expertise that otherwise might be lacking on the part of designated entities and that would make such consortia more viable and competitive. While large companies potentially offer advantages to the viability of consortia, the Congressional objective of promoting economic opportunity for designated entities should not be diluted by allowing non-designated entities to control consortia receiving preferences. Therefore, substantial justification exists for requiring over 50% of the members of consortia to be designated entities. Furthermore, as PMN stated in its comments,<sup>19</sup> each such consortium should have a qualifying presence in the market to be served. In the case of a consortium with qualifying individuals, at least one should be required to have his or her principal residence in the market to be served. In the case of a consortium with qualifying businesses, at least one should be required to have an operating presence in the market to be served.

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at 18, and Wisconsin Wireless Communications Corporation at 2. It should be noted that a substantial number of parties also advocated that over 50% of the ownership and/or control of an individual designated entity be held by a qualifying entity.

<sup>19</sup>Comments of PMN at 9-10.

**IV. Spectrum set-asides should be available for all designated entities participating in broadband PCS.**

The Commission's proposal to set aside Block C of 20 MHz and Block D of 10 MHz in each Basic Trading Area ("BTA") for designated entities participating in broadband PCS should be adopted. A significant number of parties advocated such a position. Economic incentives alone are insufficient to assure that designated entities have the necessary opportunity to provide PCS. Set-asides allow designated entities to compete against similarly situated entities.

Several other parties argued against set-asides, claiming that the purposes of the Budget Act would be better achieved through other incentives,<sup>20</sup> that Congress does not favor set-asides,<sup>21</sup> that certain designated entities might have an advantage over others,<sup>22</sup> and that the set-aside frequency blocks might not be fully utilized due to the limited resources of the designated entities.<sup>23</sup>

These arguments are unpersuasive. Section 309(j)(4)(D) of the Budget Act specifically directs the Commission to "consider the use of tax incentives, bidding preferences, and other procedures" to ensure that the designated entities have the opportunity to participate in services. Thus, use of set-asides clearly was contemplated by Congress and the Commission's use of them for PCS is within its authority under the

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<sup>20</sup>See Comments of Telocator at 11, Sprint at 8, and BellSouth at 19.

<sup>21</sup> See Comments of BellSouth at 20-21, and Sprint at 8.

<sup>22</sup> See Comments of Sprint at 8-9.

<sup>23</sup> see Comments of BellSouth at 22-23, NYNEX at 19, and Telocator at 11-12.

Budget Act. Furthermore, the Commission is justified in using set-asides for all designated entities. The alleged problems of unequal sizes among designated entities and concern for lack of utilization of set-aside frequencies are remedied by a rational policy allowing consortia, as set forth in Section III above. Designated entities will join together to form economically and technologically viable entities to compete and fully utilize the opportunities being provided by the Commission's set-aside policy. For all these reasons, the Commission should adhere to its policy of providing PCS set-asides to designated entities.

V. Combinatorial bidding should not be used for PCS.

In its Comments, PMN did not specifically oppose combinatorial bidding for BTA licensing of PCS, but perceived administrative difficulty and inequities to bidders.<sup>24</sup> A substantial number of parties urged the Commission not to use combinatorial bidding for PCS.<sup>25</sup> The reasons for such a position included the complexity of the process and the resultant limitation on diverse and smaller bidder participation, the lack of legislative basis to justify combinatorial bidding, the fact that certain classes of potential bidders may not

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<sup>24</sup> Comments of PMN at 10.

<sup>25</sup>Comments of AT&T at 4-8, Baraff, Koerner, Olender & Hockberg, P.C. at 1-2, BellSouth Corporation, et al. at 6-11. Quentin L. Breen at 1-3, Dial Page, Inc. at 2-3, Geotek Industries, Inc. at 11, GTE at 6-9, Richard A. Myers at 9, McCaw Cellular Communications, Inc. at 7-14, National Association of Black Owned Broadcasters, Inc. at 5, Pacific Bell and Nevada Bell at 5-9, Pactel Corporation at 4, Paging Network, Inc. at 18-22, 43, Rural Cellular Association at 9, Small Telephone Companies of Louisiana at 7-10, Southwestern Bell Corporation at 22-24, 26-28, Sprint Corporation at 5, Systems Engineering at 2, TDS at 11-12, Telocator at 5-7, U.S. Intelco Networks, Inc. at 12, Venus Wireless, Inc. at 2.

be eligible to place combinatorial bids (such as cellular entities due to the cellular attribution rules), and the fact that combinatorial bidding is not necessary for a group of bidders to aggregate licenses.

PMN believes that these arguments are persuasive and now is opposed to the use of combinatorial bidding for PCS for either MTAs or BTAs. Elimination of all combinatorial bidding will avoid complex and confusing procedures in the bidding process and will still allow applicants to aggregate frequency blocks and areas for PCS through the process of individually bidding for spectrum blocks and markets. Furthermore, the creation of huge entities to bid on spectrum blocks for nationwide PCS licenses could frustrate the Congressional purposes of avoiding excessive concentration of licenses and dissemination of licenses among a wide variety of applicants. The Commission should not adopt combinatorial bidding procedures.

VI. The cellular attribution rule should be eliminated for all designated entities and particularly for rural telephone companies.

In its Comments, PMN addressed the severe adverse effects that the proposed cellular attribution rule for PCS would have on deployment of PCS, on designated entities in general, and on PMN in particular.<sup>26</sup> Being an entity comprised of rural local exchange carriers that is a 50% general partner of the provider of cellular service in several RSAs, PMN would be directly affected by the Commission's cellular attribution rule. Although it

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<sup>26</sup> Comments of PMN at 10-13.

is well-suited to deploy PCS, thereby bringing this service to rural areas, and to compete in the provision of PCS as a result of the incentives for designated entities, the attribution rule threatens to block PMN's participation in this new vital service. PMN is not alone in this view. Several other parties cited similar situations<sup>27</sup> or advocated that the attribution rule should be revoked.<sup>28</sup> If designated entities are restricted by this rule, they will be handicapped in taking the steps necessary to be viable competitors in PCS. Included is the ability to form consortia among designated entities and with others.<sup>29</sup> Such a result would be counter to the Congressional directive of ensuring the opportunity for designated entities to compete in such services.

An additional aspect of the cellular ownership attribution rule should be considered, which is its effect on limited partnerships. If an entity has a limited partnership in a cellular license, that interest should not be attributable for purposes of the PCS limitation. A limited partner by its very nature does not exercise control over the license and therefore its limited interest should not be included in the attribution rule.

The cellular attribution rules severely handicap and restrict the ability of designated entities, particularly rural telephone companies, to participate in the provision of PCS. Those rules are ill-advised and are contrary to the specific objectives set forth in the Budget

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<sup>27</sup> Comments of OPASTCO at 8-10, and Chickasaw Telephone Company at 4-5.

<sup>28</sup> Comments of American Personal Communications at 6 Bell Atlantic Personal Communications, Inc. at 2-3, Chickasaw Telephone Company at 4-5, OPASTCO at 9, Palmer Communications Incorporated at 3, Rocky Mountain Telecommunications Association, et al. at 6, and Telephone Association of Michigan at 14.

<sup>29</sup> This need was specifically recognized by Bell Atlantic Personal Communications, Inc. in its Comments at 3, 15-17.

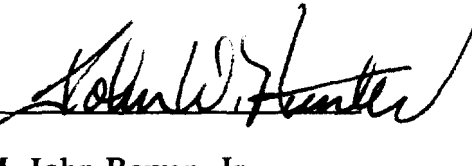
Act. They should be eliminated for designated entities, particularly rural telephone companies.

VII. Conclusions

PMN, Inc. urges the Commission to adopt the positions set forth in its Comments and as modified and expanded in these Reply Comments for the reasons stated herein.

Respectfully submitted,

PMN, INC.

By: 

M. John Bowen, Jr.  
John W. Hunter

MCNAIR & SANFORD, P.A.  
1155 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 659-3900

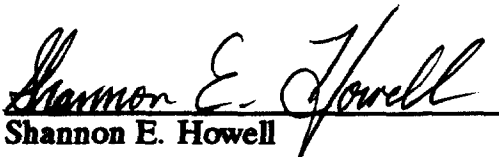
Its Attorneys

November 30, 1993



**CERTIFICATE OF SERVICE**

I, Shannon E. Howell, hereby certify that a copy of the foregoing Reply Comments of PMN, Inc. was mailed, postage prepaid, first-class United States mail, this thirtieth day of November, 1993, to the parties on the attached list.

  
Shannon E. Howell

### SERVICE LIST

Abby Dilley  
6278 Gentle Lane  
Alexandria, VA 22310

John D. Pellegrin, Chtd.  
1140 Connecticut Avenue, N.W.  
Suite 606  
Washington, D.C. 20036

Robert J. Miller  
Gardere & Wynne, L.L.P.  
1601 Elm Street, Suite 3000  
Dallas, TX 75201

Robert Weigend  
Schnader, Harrison,  
Segal & Lewis  
1119 Nineteenth Street, N.W.  
Washington, D.C. 20036

David L. Nace  
Lukas, McGowan, Nace  
& Gutierrez, Chartered  
1819 H Street, N.W. Seventh  
Floor  
Washington, D.C. 20006

Curtis White  
1920 L Street, NW  
Suite 700  
Washington, D.C. 20036

William D. Jimerson  
ALLIANCE TELCOM, INC.  
34 Woodbine Road  
Pittsford, NY 15534

John A. Prendergast  
Blooston, Mordkofsky, Jackson  
& Dickens  
2120 L Street, N.W., Suite 300  
Washington, D.C. 20037

Jonathan D. Blake  
Covington & Burling  
Post Office Box 7566  
Washington, D.C. 20006

Wayne V. Black  
Keller and Heckman  
1001 G Street, N.W.  
Suite 500 West  
Washington, D.C. 20001

Francine J. Berry  
295 North Maple Avenue  
Basking Ridge, NJ 07920

Albert H. Kramer  
Keck, Mahin & Cate  
1201 New York Avenue, N.W.  
Washington, D.C. 20005

Melodie A. Virtue  
AMERICAN WOMEN IN RADIO AND  
TELEVISION INC.  
1101 Connecticut Ave., N.W.  
Suite 700  
Washington, D.C. 20036

Frank Michael Panek  
AMERITECH  
2000 W. Ameritech Center Dr.  
Room 4H84  
Hoffman Estates, IL 60196-1025

Lon C. Levin  
AMSC Subsidiary Corp.  
10801 Park Ridge Boulevard  
Reston, VA 22091

Arlene F. Strege  
Rm 2A-382  
67 Whippany Road  
Whippany, NJ 07981

Paul J. Berman  
Covington & Burling  
P.O. Box 7566  
Washington, D.C. 20044

James E. Meyers  
BARAFF, KOERNER, OLENDER &  
HOCHBERG, P.C.  
5335 Wisconsin Avenue, N.W.  
Suite 300  
Washington, D.C. 20015

David F. Gencarelli  
1919 Pennsylvania Avenue, N.W.  
Suite 300  
Washington, D.C. 20006

Jeffrey T. Bergner  
BERGNER, BOYETTE, BOCKORNY &  
CLOUCH, INC.  
Sixteenth Street, N.W.  
Suite 500  
Washington, D.C. 20036

ARCH COMMUNICATIONS GROUP  
1800 West Park Drive  
Suite 250  
Westborough, MA 10581

Dennis C. Brown  
BROWN AND SCHWANINGER  
1835 K Street, N.W.  
Suite 650  
Washington, D.C. 20006

Theodore D. Frank  
Arent Fox Kintner  
Plotkin & Kahn  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5339

Peter H. Feinberg  
Dow, Lohnes & Albertson  
1255 23rd St., N.W., Suite 500  
Washington, D.C. 20037

Thomas J. Keller  
Verner, Liipfert, Bernhard,  
McPherson and Hand, Chtd.  
901 15th St., N.W., Suite 700  
Washington, D.C. 20005

John S. Hannon, Jr.  
6560 Rock Spring Drive  
Bethesda, MD 20817

David J. Brugger  
ASSOCIATION OF AMERICA'S  
PUBLIC TELEVISION STATIONS  
1350 Connecticut Avenue, N.W.  
Suite 200  
Washington, D.C. 20036

Howard Polsky  
6560 Rock Spring Drive  
Bethesda, MD 20817

Richard S. Wilensky  
Middleberg, Riddle & Gianna  
2323 Bryan Street  
Suite 1600  
Dallas, TX 75201

John D. Lockton  
CORPORATE TECHNOLOGY PARTNERS  
100 S. Ellsworth Ave.  
9th Floor  
San Mateo, CA 94401

Michael R. Carper  
General Counsel  
CENCALL COMMUNICATIONS  
CORPORATION  
3200 Cherry Creek Drive South  
Denver, CO 80110

Milton Bins  
COUNCIL OF 100  
1129 20th Street, N.W.  
Suite 400  
Washington, D.C. 20036

Nancy Douthett  
Principal  
CONVERGING INDUSTRIES  
P.O. Box 6141  
Columbia, MD 21045-6141

Thomas Gutierrez  
Lukas, McGowan, Nace &  
Gutierrez  
1819 H St., N.W. Suite 700  
Washington, D.C. 20006

Peter A. Casciato  
A Professional Corporation  
1500 Sansome Street, Suite 201  
San Francisco, CA 74111

Joe D. Edge  
Hopkins & Sutter  
888 16th St., N.W.  
Washington, D.C. 20006

Philip L. Verveer  
Wilkie Farr & Gallagher  
1155 21st St., N.W., Suite 600  
Washington, D.C. 20036-3384

Werner K. Hartenberger  
Dow, Lohnes & Albertson  
1255 23rd St., Suite 500  
Washington, D.C. 20037

Michael F. Altschul  
CELLULAR TELECOMMUNICATIONS  
INDUSTRY ASSOCIATION  
Two Lafayette Centre,  
Third Floor  
1133 21st Street, N.W.  
Washington, D.C. 20036

David F. Gencarelli  
1919 Pennsylvania Avenue, N.W.  
Suite 300  
Washington, D.C. 20006

Ellen S. Deutsch  
CITIZENS UTILITIES COMPANY  
P.O. Box 340  
Elk Grove, CA 95759-0340

William J. Franklin  
1919 Penn. Ave., N.W.  
Suite 300  
Washington, D.C. 20006-3404

Calvin H. Johnston  
DATA LINK COMMUNICATIONS  
Corporate Center  
26635 W. Agoura Road  
Suite 105  
Calabasas, CA 91302

Eroca Daniel  
220 E. Wilbur Rd. #A  
Thousand Oaks, CA 91359

William Dekay  
Executive VP for Bus.  
Development  
DIAL PAGE, INC.  
P.O. Drawer 10767  
Greenville, SC 29603-0767

Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900, East Tower  
Washington, D.C. 20005

Shirley S. Fujimoto  
Keller and Heckman  
1001 G Street, N.W.  
Suite 500 West  
Washington, D.C. 20001

Andrew D. Lipman  
Swidler & Berlin, Chartered  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007

Harold K. McCombs, Jr.  
DUNCAN, WEINBERG, MILLER &  
PEMBROKE, P.C.  
1615 M St., N.W. Suite 800  
Washington, D.C. 20036

Kathy L. Shobert  
Dir., Federal Regulatory  
Affairs  
GENERAL COMMUNICATIONS, INC.  
888 16th St., N.W., Suite 600  
Washington, D.C. 20006

J. Jeffrey Craven, Esquire  
Besozzi, Gavin & Craven  
1901 L Street, N.W., Suite 200  
Washington, D.C. 20036

Carl W. Northrop  
Suite 700  
700 13th St., N.W.  
Washington, D.C. 20005

Lee L. Selwyn  
President  
ECONOMICS AND TECHNOLOGY, INC.  
One Washington Mall  
Boston, MA 02108-2617

Edward C. Schmults  
Senior V.P. - External Affairs  
and General Counsel  
GTE SERVICE CORPORATION  
One Stamford Forum  
Stamford, CT 06904

Edward M. Johnson  
P.O. Box 2688  
Crossville, TN 38557

Gail L. Polivy  
GTE SERVICE CORPORATION  
1850 M Street, N.W.  
Suite 1200  
Washington, D.C. 20036

GVNW INC./MANAGEMENT  
7125 S.W. Hampton Street  
Suite 100  
Tigard, OR 97223

Lois E. Wright  
INNER CITY BROADCASTING CORP.  
801 Second Avenue  
New York, NY 10017

Henry J. Staudinger  
Rt. 1, Box 245  
Toms Brook, VA 22660

Jack Taylor  
9215 Rancho Drive  
Elk Grove, CA 95624

Gary M. Epstein  
Latham & Watkins  
1001 Penn. Ave., N.W.  
Washington, D.C. 20004

Louis Gurman  
Gurman, Kurtis, Blask &  
Freedman, Chtd.  
1400 Sixteenth St., N.W.  
Suite 500  
Washington, D.C. 20036

David L. Hill  
O'Connor & Hannan  
1919 Penn. Ave., N.W.  
Suite 800  
Washington, D.C. 20006

Jeff Johnston  
26635 W. Agoura Road  
Suite 105  
Calabasas, CA 91302

Frederick J. Day  
1110 N. Glebe Rd., Suite 500  
Arlington, VA 22201-5720

James M. Rhoads  
President  
JMP TELECOM SYSTEMS, INC.  
P.O. Box 292557  
Kettering, OH 45429

James U. Troup  
Arter & Hadden  
1801 K Street, N.W.  
Washington, D.C. 20006

Eliot J. Greenwald  
Fisher, Wayland, Cooper  
& Leader  
1255 23rd St., N.W. Suite 800  
Washington, D.C. 20037

Robert Cook  
Chairman and CEO  
U.S. INTELCO NETWRKS, INC.  
P.O. Box 2909  
Olympia, WA 98507

John Dudinsky, Jr.  
JOHN DUDINSKY & ASSOCIATES  
305 East Capitol Street, S.E.  
Washington, D.C. 20003

Robert B. Kelly  
Kelly, Hunter, Mow &  
Povich, P.C.  
1133 Connecticut Ave., N.W.  
Washington, D.C. 20036

David L. Nace  
Lukas, McGowan, Nace  
& Gutierrez, Chtd.  
1819 H Street, N.W., 7th Floor  
Washington, D.C. 20006

Linda K. Smith  
William D. Wallace  
Crowell & Moring  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Ann K. Newhall  
Moss & Barnett  
4800 Norwest Center  
Minneapolis, MN 55402

Leslie A. Taylor  
Leslie Taylor Associates  
6800 Carlynn Court  
Bethesda, MD 20817-4302

Timothy E. Welch  
Hill & Welch  
Suite #113  
1330 New Hampshire Ave., N.W.  
Washington, D.C. 20036

Richard S. Myers  
LAW OFFICE OF RICHARD S. MYERS  
1030 15th Street, N.W.  
Suite 908  
Washington, D.C. 20005

Henry E. Crawford  
1150 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036

Henry A. Solomon  
Haley, Bader & Potts  
Suite 900  
4350 North Fairfax Drive  
Arlington, VA 22203-1633

David J. Kaufman  
Brown Nietert & Kaufman, Chtd.  
1920 N Street, NW, Suite 660  
Washington, D.C. 20036

David R. Smith  
Alexnader, Gebhardt, Aponte  
& Marks  
Lee Plaza - Suite 805  
8601 Georgia Avenue  
Silver Spring, MD 20910

Michael D. Kennedy  
MOTOROLA, INC.  
1350 I Street, NW  
Suite 400  
Washington, D.C. 20005

Scott K. Morris  
Vice President - Law  
MCCAW CELLULAR COMMUNICATIONS,  
INC.  
5400 Carillon Point  
Kirkland, WA 98033

Barry Lambergman  
Fletcher Heald & Hildreth  
1300 N. 17th Street,  
11th Floor  
Rosslyn, VA 22209

Larry Blosser  
MCI TELECOMMUNICATIONS  
CORPORATION  
1801 Penn. Ave., N.W.  
Washington, D.C. 20006

Philip L. Malet  
Steptoe & Johnson  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036

Gene A. Bechtel  
Bechtel & Cole, Chartered  
Suite 250  
1901 L Street, N.W.  
Washington, D.C. 20036

David E. Weisman  
Meyer, Faller, Weisman and  
Rosenberg, P.C.  
4400 Jenifer St., N.W.,  
Suite 380  
Washington, D.C. 20015

James L. Winston  
Rubin, Winston, Diercks,  
Harris & Cooke  
1730 M St., N.W. Suite 412  
Washington, D.C. 20036

Barry D. Umansky  
1771 N Street, N.W.  
Washington, D.C. 20036

Margot Smiley Humphrey  
Koteen & Naftalin  
1150 Connecticut Ave., N.W.  
Suite 1000  
Washington, D.C. 20036

David Cosson  
NATIONAL TELEPHONE  
COOPERATIVE ASSOCIATION  
2626 Pennsylvania Ave., N.W.  
Washington, D.C. 20037

Robert S. Foosamer  
NEXTEL COMMUNICATIONS, INC.  
601 13th Street, N.W.  
Suite 1100 South  
Washington, D.C. 20005

Lisa M. Zania  
General Counsel  
THE ORGANIZATION FOR THE  
PROTECTION AND ADVANCEMENT  
OF SMALL TELEPHONE COMPANIES  
21 Dupont Circle, NW Suite 700  
Washington, D.C. 20036

OYE AJAYI-OBE  
1521 Heather Hollow Circle  
Suite 21  
Silver Spring, MD 20904

James P. Tuthill  
PACIFIC BELL AND NEVADA BELL  
140 New Montgomery Street  
Room 1529  
San Francisco, CA 94105

James L. Wurtz  
PACIFIC BELL AND NEVADA BELL  
1275 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

Brian D. Kidney  
PACTEL CORPORATION  
2999 Oak Road, MS 1050  
Walnut Creek, CA 94596

Bryan Cave  
Suite 700  
700 13th Street, N.W.  
Washington, D.C. 20005

Mark A. Stachiw  
Pactel Paging  
12221 Merit Drive, Suite 800  
Dallas, TX 75251



Judith St. Ledger-Roty  
Reed Smith Shaw & McClay  
1200 18th Street, N.W.  
Washington, D.C. 20036

Stephen Curtin  
President  
PCNS-NY, Inc.  
17 Battery Place, Suite 1200  
New York, NY 10004-1256

Richard L. Vega, Jr.  
President  
PHASE ONE COMMUNICATIONS, INC.  
3452 Lake Lynda Drive, #115  
Orlando, FL 32817

John Hearne, Chairman  
POINT COMMUNICATIONS COMPANY  
100 Wilshire Boulevard  
Suite 1000  
Santa Monica, CA 90401

Howard M. Liberman  
Arter & Hadden  
1801 K Street, N.W.  
Suite 400K  
Washington, D.C. 20006

Peter Arth, Jr.  
PUBLIC UTILITIES COMMISSION OF  
THE STATE OF CALIFORNIA  
505 Van Ness Avenue  
San Francisco, CA 94102

Quentin L. Breen  
3 Waters Park Drive, #231  
San Mateo, CA 94403-1144

Cary S. Tepper  
Meyer, Faller, Weisman  
& Rosenberg, P.C.  
4400 Jenifer Street, N.W.  
Suite 380  
Washington, D.C. 20554

Peter Tennewald  
Arent Fox Kintner and Kahn  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036-5339

Daniel S. Goldberg  
Goldberg, Godles, Wiener  
& Wright  
1229 Nineteenth Street, N.W.  
Washington, D.C. 20036

Theodore W. Wing, II  
V.P. Marketing  
THE RICHARD L. VEGA GROUP  
235 Hunt Club Blvd.  
Longwood, FL 32779

John D. Pellegrin  
Law Offices of John D.  
Pellegrin, Chtd.  
1140 Connecticut Avenue, N.W.  
Suite 606  
Washington, D.C. 20036

Michael J. Shortley, III  
ROCHESTER TELEPHONE  
CORPORATION  
180 South Clinton Avenue  
Rochester, New York 14646

Ann K. Newhall, Attorney  
Moss & Barnett  
4800 Norwest Center  
Minneapolis, MN 55402